Supreme Court, U. S.
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79-2038

No.

In the
Supreme Court of the United States

DONALDSON KIMBROUGH,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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Petitioner, Donaldson Kimbrough, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois denying petitioner's petition for leave to appeal from the Appellate Court of Illinois, First Judicial District, which court had affirmed a judgment of conviction entered by the Circuit Court of Cook County, Illinois.

STATE COURT ORDERS AND OPINIONS

The order of the Supreme Court of Illinois in case number 53034 is merely a denial of a petition for leave to appeal from a decision of the Appellate Court of Illinois, First District. A copy of the memorandum of the Clerk of the Illinois Supreme Court is printed in the appendix to this Petition.

The order of the Appellate Court of Illinois, First Judicial District, in case number 78-717 and 78-2015 (consolidated) Disposing of Appeal Under [Illinois] Supreme Court Rule 23 is printed in the appendix to this Petition, as is a copy of the order denying a petition for rehearing.

JURISDICTION

The judgment of the Illinois Supreme Court denying petitioner's petition for leave to appeal from the judgment of the Illinois Appellate Court, First Judicial District, was entered March 27, 1980 (appendix). The judgment of the Illinois Appellate Court, First Judicial District, affirming the judgment of the Circuit Court of Cook County, was entered December 14, 1979 (appendix). The judgment of the Illinois Appellate Court denying petitioner's petition for rehearing was entered January 9, 1980 (appendix). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

ISSUES PRESENTED FOR REVIEW

The judgments of the Illinois Courts are repugnant to the United States Constitution in that they will act to deprive defendant of his liberty without due process of law, in violation of the United States Constitution, Amendments V and XIV, and deny him the right to a fair and impartial trial, in violation of the United States Constitution, Amendment VI:

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V, provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI, provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."

United States Constitution, Amendment XIV, provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

NATURE AND DISPOSITION

Defendant was indicted for the crime of arson allegedly committed in violation of Illinois Revised Statutes, Chapter 38, paragraph 20-1 (a). After a bench trial he was found guilty and sentenced to two to six years in the penitentiary.

THE TRIAL

If otherwise credible and not violative of defendant's constitutional rights, the testimony as related in the order of the Illinois Appellate Court, First Judicial District, Disposing of Appeal Under [Illinois] Supreme Court Rule 23 is substantially correct.

Succinctly stated, one Sergeant Warner of the Chicago Police Department testified that at 3:40 a.m. he saw defendant throw a lighted flare into a building and immediately thereafter a fire ensued. Warner said he saw defendant then run to his nearby vehicle and start to drive southbound. The officer said he then swung his police vehicle, from which he had observed the foregoing, across the street and stopped defendant.

Defendant testified that he had had carburetor trouble and had stopped to fix the car and had started up when he was stopped by Sergeant Warner. The gasoline wetness and smell on his clothes was from the carburetor.

The order of the Illinois Appellate Court failed to note, however, that a police report identified by Sergeant Warner, although prepared by another officer, was prepared on the basis of what Sergeant Warner told the other officer and was approved by Sergeant Warner as that other officer's superior. (Tr. 30-34*), the first part of which really was Sergeant Warner's report. (Tr. 39-40).

Tr. refers to the transcript of trial in the Circuit Court of Cook County, pertinent portions of which are included in the appendix hereto.

R refers to the common law record of the Circuit Court of Cook County, pertinent portions of which are reproduced in the appendix hereto.

Secondly, the order of the Illinois Appellate Court does not reflect the Trial Court's observation, in rejecting defendant's exculpatory testimony, that ". . . if you diddle with a carburetor you aren't likely to get anything but fumes because that's all the carburetors emit." (Tr. 296-297).

PRESERVATION OF FEDERAL QUESTIONS

While not precisely stated as federal questions as such, the substance thereof was raised in defendant's Motion for a New Trial timely filed in the Circuit Court of Cook County (R. C77). Paragraphs 5 and 6 thereof relate to the matters involving the testimony of the reporting police officer and paragraph 7 thereof relates to the matter considered by the trial court without support in the record. The motion was denied at page 329 of the transcript of proceedings in the Circuit Court of Cook County.

These questions were variously raised either in petitioner's brief in the Illinois Appellate Court, his petitions for rehearing in the Illinois Appellate Court, or in his petition for leave to appeal filed in the Illinois Supreme Court. The latter two petitions were denied without comment.

ARGUMENT

I.

THE FAILURE OF A POLICE OFFICER TO RECORD OR CAUSE TO BE RECORDED SIGNIFICANTLY RELEVANT INFORMATION ABOUT WHICH HE SUBSEQUENTLY TESTIFIED CONSTITUTED SUCH A DEPARTURE FROM THE NORM THAT A GUILTY VERDICT UNDER SUCH CIRCUMSTANCES AMOUNTS TO DENIAL OF LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF U.S. CONSTITUTION, AMENDMENTS V AND XIV.

Sergeant Warner of the Chicago Police Department testified on cross-examination that the report which he made or adopted did not contain any of the following relevant material about which he testified on direct examination:

1) That he was parked;

2) That he was in a parked car with the lights off;

3) That he observed a person step out through a window of the burned building;

4) That the person who came out of the window took five or six steps and then turned around;

5) That the person then threw what appeared to be a flare into the building;

6) That there was a sudden explosion followed by a shot of flame;

7) That the person who threw the flare ran south and got into a car and the lights went on;

8) That he stopped the individual who upon inquiry said he was going home, that he lived around the corner (R. 41-42).

To the contrary, the report apparently reflected that as the "reporting officer" approached the scene he observed a male white running to a green Plymouth, and that thereafter the reporting officer asked the suspect for a driver's license and asked him what he was running from (R. 42-43).

Without the testimony of Sergeant Warner the evidence presented through other witnesses is equally consistent with the exculpatory testimony of the defendant, and standing alone is unsufficient to sustain a conviction. Consequently, the cross-examination of Sergeant Warner on the contents of the report takes on extreme significance. Omission from the report of any significant description of the events which allegedly led to the arrest of defendant does not comport with commonly accepted knowledge that police reports of this kind prepared or approved by Sergeant Warner as the reporting officer or the approving supervisor invariably contain a description of such events.

Even Illinois authority supports the position that convictions obtained on such impeached testimony do not comport with the accepted standards of due process and should be reversed. *People* v. *Pugh*, 36 Ill. 2d 435, 223 N.E. 2d 115 (1967) and *People* v. *Mosley*, 131 Ill. App. 2d 722, 265 N.E. 2d 889 (3rd Dist., 1971).

This action by the Illinois Courts violates the due process mandate that proof in a criminal case must be beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358 (1969). The reports and testimony of Sergeant Warner do not comport with that standard.

Moreover, the Illinois Appellate Court, in commenting upon the problem of the police report, order P. 3, stated that Sergeant Warner testified that he did not prepare

the police report. But, as the cross-examination referred to above and included in the appendix hereto demonstrates, he in fact was the so-called "reporting officer" as well as the approving supervisor. It is not quite accurate to suggest, as the Illinois Appellate Court has done, that Warner was cross-examined about someone else's report.

II.

THE HONORABLE TRIAL COURT COMMITTED SUCH REVERSIBLE ERROR THAT TO ALLOW A CONVICTION TO STAND WOULD BE TANTAMOUNT TO DEPRIVING DEFENDANT OF HIS RIGHT UNDER THE UNITED STATES CONSTITUTION, AMENDMENT VI. TO A FAIR AND IMPARTIAL TRIAL.

As reflected on page three of the order of the Illinois Appellate Court, defendant testified that his presence at the scene of a fire was occasioned by his having car trouble and having to adjust his carburetor.

In commenting on that testimony the trial court speculated that ". . . if you diddle with a carburetor you aren't likely to get anything but fumes because that's all that the carburetors emit" (Tr. 297).

The record does not, however, contain any evidence that carburetors emit only fumes. And if defendant's car was giving him trouble as he testified, then perhaps the court was not only wrong in speculating on something that is not in the record, he was also wrong in his quasi-scientific conclusion.

In any event, such an offhand statement strongly suggests an initial disbelief of defendant's testimony and constitutes an abuse of judicial discretion where the court is also the fact-trier, thus depriving defendant of a fair and impartial trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

30 Will you mark this Defendant's Exhibit Number 1 for identification?

(Said document was marked Defendant's Exhibit Number 1 for identification.)

MS. WOLFSON: Q. At around 7:00 o'clock you had an occasion to sign another report.

A. Yes.

Q. Whose report was that?

A. That was Officer Kane and Bendel's I believe.

Q. Now, I'm showing you what has been marked as Defendant's Exhibit Number 1 for identification.

Calling your attention to that police report -- it's two pages. Does it bear your signature?

A. Yes, it does.

Q. How many times?

A. Twice on my signature.

Q. The first place -- time you signed your signature was at 7:00 o'clock, was it not?

A. Says 0700, right.

Q. And you signed that report again at 0730, did you not?

A. Right.

Q. The second time you signed that report it was
31 as the approving officer, isn't that correct?

A. Yes.

Q. And the first time you signed that report as a reporting officer, is that correct?

A. Yes.

Q. You adopted that report, did you not?

A. Beg your pardon?

Q. Let me ask this first, sergeant. Did you write that report?

A. No, I didn't.

Q. Who wrote the report?

A. Officers Kane and Bendel.

Q. All right. The two of them wrote it or one of them wrote it?

A. I would assume Officer Kane did. He is listed in box 95 as the reporting officer number one and usually number one writes the report.

Q. And when you signed it as the reporting officer and then a half hour later as the approving officer, you adopted the report, didn't you?

MR. ROMANO: Objection to the word adopting.

THE COURT: No, he may answer the question.

THE WITNESS: Adopt, would you explain what you mean by adopt the report, please?

32 MS. WOLFSON: Q. Adopted the report. Why don't you explain to me what you did or what you meant when you signed it as the approving officer.

A. Because that was a part of my duties to approve the report.

Q. No matter what the report said.

A. After I viewed the report.

Q. All right. You read the report before you signed it, didn't you?

A. Yes, I did.

Q. Did you read it before you signed it the first time?

A. The first time -- the first time -- I'm not sure if I signed it the first time or if I just put both signatures down at the same time.

Q. Well, after your first signature on there as reporting officer, the indicated time is 0700, isn't that correct?

A. Right.

Q. And after your signature there is approving officer. The indicated time is 0830, isn't that correct?

A. That's correct.

Q. Now did you sign it and put in -- did you sign it at two different times?

33 A. I don't recall, counsel.

Q. Well, might you have been fooling when you put in 0700 after the first signature and 0730 after the second?

A. Fooling?

Q. Yes.

A. No, I don't think I was fooling. I probably just signed it both at the same time.

Q. And yet you entered --

A. 0730.

Q. -- entered as the times, 0700 and 0730.

A. I'm not even sure if that's my writing on the 0700, counsel, here.

Q. Well, now who --

A. 0730 is definitely mine.

Q. Do you recall putting in a time after you signed this as the reporting officer?

A. No, I don't.

Q. And you say as you look at this now conceivably the 0700 might have been put there by somebody else.

A. Possibly.

Q. Who else might have put 0700 after your signature as reporting officer?

MR. ROMANO: Objection.

34 THE COURT: Overruled.

THE WITNESS: I have no idea.

MS. WOLFSON: Q. Would any officer in the 15th District come in and tamper with your reports?

MR. ROMANO. Objection to the word tampering. Objection to this relevance of this line of questioning.

THE COURT: Overruled.

THE WITNESS: Well, the reports are open. They're available to any police officer that wants to look at them.

MS. WOLFSON: Q. Isn't it true that everytime an officer signs a report such as this -- by the way, this is the initial report on the incident, isn't it?

A. This is the one made by Kane and Bendel, yes, ma'am.

Q. With your name and your signature as approving and reporting officer, right?

A. Yes.

Q. Isn't it true in the box provided for an officer's signature right after that there is a box provided where that officer is to enter the time?

A. Date the investigation completed and time.

Q. On December 8th, 1976 you were a sergeant of police, weren't you?

A. Yes, ma'am.

Report refers to Officer Kane.

* * *

39 A. I'm not sure the way it's written out. It appears that I am the R/O and beat 1520 is assisting me.

Q. It certainly does appear that way.

A. That's the way it appears.

Q. For instance on page one of that report, it says as the R/O approached the scene and MW was observed running, doesn't it? That's on the first page, the very first entry on that report.

A. Yes.

Q. And that concerns an R/O who was the only police officer present when a person was seen running, isn't that right?

MR. ROMANO: Objection to the form of the counsel's question.

THE COURT: The objection is overruled.

THE WITNESS: Yes, ma'am.

MS. WOLFSON: Q. From the context—

Why don't you read the report to yourself. Just take a moment or so and read it.

A. Okay.

Q. The context of the entire narrative of this two page report signed by yourself in two places indicates that the R/O is Sergeant Warner, isn't that true?

A. That would indicate that to me, yes. The first section of the report.

Q. Well, now what about -- you say the first section?

A. Yes. The first part of the report.

Q. Well, all right. Let's go to the second part of the report. How about where it says R/O then turns offender over to Officer Kane and Bendel? R/O means you, doesn't it?

A. That's a part of the first part of the report.

Q. All right. That comes after—

A. After that it looks like Kane picked up on his own.

Q. But before that comes the part where it says R/O with assistance of beat 1520 asked suspect for a driver's license and what he was running from, doesn't it?

MR. Romano: Objection. It's been asked and answered. We have gone over this twice now.

THE COURT: Sustained.

MS. WOLFSON: I think the latter part is something new.

So it was you who asked Kimbrough for a driver's license and asked him what he was running from.

MR. ROMANO: Objection. I believe it was sus-
41 tained before.

THE COURT: Sustained.

MS. WOLFSON: Q Now this report in which we have determined that you are the reporting officer, does it say anywhere in this report that the reporting officer was parked northbound on Central at about 1517 or 1519 about two hundred and fifty feet from the corner? Does it say that anywhere in this report?

A. No, ma'am.

Q. Does it say anywhere in this report that you were sitting at that location in a parked car with the lights off?

A. No, ma'am.

Q. Does it say anywhere in this report that you observed a person step out through a window on the Central Avenue side of the building located at 5601 North Avenue?

A. No', ma'am.

Q. Does it say anywhere in this report that a person came out of a window on Central Street and took five or six steps and then turned around?

A. No, ma'am.

Q. Does it say anywhere in this two page report signed by you in two places that a person got out
42 of a window on Central Avenue and took five or six steps, turned around and threw what appeared to you to be a flare into the building?

A. No, ma'am.

Q. Did it say anywhere in this report tht there was a sudden explosion followed by a sheet of flames?

A. No, ma'am.

Q. Does it say anywhere in this report that the person who threw the flare then ran south?

A. No, it doesn't say that.

Q. Does it say anywhere in that the person then got into a car and the lights went on?

A. No, it doesn't say that.

Q. Does it say anywhere in this report that you then put your lights on and activated your mars light, stopped the individual in the car and said where are you going and the individual said I'm going home, I live around the corner. Is that anywhere in your report?

A. No, ma'am.

Q. On the contrary, the report refers to the fact that the report -- as the reporting officer approached the scene, a male white was observed running to a green Plymouth. Isn't that what the report says?

A. Yes, ma'am.

43 Q. And it doesn't say that the reporting officer pursued the suspect after calling for fire equipment and assistance, doesn't the report say that?

A. Yes, ma'am.

Q. Doesn't the report then say that the reporting officer asked the suspect for a driver's license and asked him what he was running from?

A. Well, that isn't precisely what the report says.

Q. It says the reporting officer with the assistance of 1520 asked the suspect for a driver's license and what he was running from. It does say that, doesn't it?

A. That is what the report says, yes, ma'am.

Q. All right. Now, sergeant, after you turned Mr. Kimbrough over to Officers Kane and Bendel, you went on to the fire, is that right?

A. Yes, ma'am.

Q. And about how long did you stay at the scene of the fire?

A. Almost two hours, maybe.

Q. And it's correct to say that other police officers and fire department personnel arrived on the scene, did they not?

A. Yes, ma'am.

* * *

296 into containers similar to those found in the defendant's car to make a trailer. No one knows to where or how. I submit that that is bootstrapping upon bootstrapping. It is indeed a theory. It's not borne out by any physical or testimonial proof.

THE COURT: Of course, by the nature of the evidence, the incendiary occasion, there is not going to be trails and trains of evidence which can be produced which would show in particularity what exactly occurred. All of these trains and trailers are going to be consumed by the fire. And there was quite an explosion there. Nobody denies that. So all you are going to be able to do is to infer from circumstances and such direct evidence as you have, and you do have direct evidence in this case. It's not at all a circumstantial case. The defendant was there. The defendant had clothes which were soaked and fuming with gasoline, which he says occurred because he was fiddling with his carburetor, which Mr. Velarde suggests is an unlikely occurrence. A carburetor is by design made to produce small jets of fire when mixed with air. And if you diddle with a carburetor, you aren't likely to get anything except fumes because that's all carburetors emit. They emit

297 a mixture. The fuel goes in and mixes with the air and squirts this mixture, this vapor, so that's direct evidence.

And, of course, you attack Sergeant Warner's statement, and as well you should, that Sergeant Warner saw an explosion and a fire. He said he did. But he doesn't have that in his report either, is that what you say?

MRS. WOLFSON: Yes.

THE COURT: But there was a fire. And I am not told by Warner why he was seated there at 3:00 o'clock in the morning watching. I really don't know why. Why, then, if there was a fire and he saw it, why did he go to somebody about a headlight that was missing? He would go in and see what he could do, as the other officers did, to see if anybody was living in the place.

So we have direct evidence that there was a fire. He was arrested at the scene. The officer had to have some reason for arresting him. And I am not at all -- It is not suggested by any of your argument an attack on the evidence of the prosecution. Why it was Sergeant Warner who knew of the fact that there was a fire. We have to assume he saw the fire. The fire occurred before the defendant was in his car.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

vs.

DONALDSON KIMBROUGH,

No. 77-I-1208

MOTION FOR NEW TRIAL
(Filed February 10, 1978)

Defendant Donaldson Kimbrough, by his attorneys, pursuant to Chapter 38, Section 116-1, Ill. Rev. Stat. 1977, moves the Court to enter an Order granting him a new trial of the above-captioned cause; and as reasons therefor states:

1. The evidence was not sufficient to support a finding of guilty of arson.

C78 2. The Court erred in the admission and exclusion of evidence. The Court erred in admitting improper evidence offered by the State and refusing to allow proper evidence on behalf of the defendant.

3. The Court erred in refusing to allow certain questions on cross-examination.

4. The Court erred in admitting certain of the State's exhibits in evidence.

5. The Court erred in refusing to allow defendant's Motion for Finding of Not Guilty at the close of the State's case-in-chief.

6. The Court erred in its ruling that, at the close of all the evidence, the State had met its burden of proof beyond a reasonable doubt.

7. The Court erred in considering facts not in evidence in its final ruling.

C79 8. The above allegations are made without the fit of a written transcript. Defendant does not limit his motion to the grounds stated, nor does he waive any point of error, directly or indirectly or by implication, but includes in this motion any and all errors committed at trial that will entitle him to relief, and includes those errors not brought to the attention of the Court during trial, whether because of inadvertence or oversight of counsel.

Respectfully submitted,

Jo-Anne F. Wolfson

Glenn E. Gutsche
Attorneys for Defendant

• • •

329 from the probation department, having nothing to do with his attorneys or Mr. Kimbrough.

We now have the report here. And we're entitled, I believe, under the new act to a reasonable continuance. And I, respectfully, request that of the Court.

THE COURT: You're entitled, under the old act and the new act, I think, to forty-eight hours to become acquainted with the contents of the pre-sentence investigation report.

So if that's the reason for which you ask the continuance, I, of course, will grant same.

All right. How's about one week?

MRS. WOLFSON: A week from today?

THE COURT: A week from today.

MRS. WOLFSON: That's fine, Judge.

THE COURT: And the record will show that you filed your motion for arrest and new trial and without argument and comments they are denied.

78-717 & 78-2015
(Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

DONALDSON KIMBROUGH,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable MARK E. JONES, *Judge Presiding.*

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following a bench trial, defendant was convicted of arson and sentenced to 2 to 6 years in the penitentiary. (Ill. Rev. Stat. 1975, ch. 38, par. 20-1 (a).) On appeal, defendant contends he was not proved guilty beyond a reasonable doubt.

On December 8, 1976, a fire occurred in a building owned by Peter Pappas at 5601 North Avenue in the City of Chicago. Pappas testified that premises on the first floor were being remodeled for use as a messenger service and were almost completed. Between 4:30 and 5 a.m., when he arrived at the scene, the fire was still burning. When he then went upstairs to an office in the building located above the messenger service, he detected a strong odor of gasoline.

Chicago Police Sergeant Robert J. Warner testified he was across the street from the premises at 3:40 a.m. in a marked police car with the lights off when he observed the defendant throw a flare through the window of the

premises. There was an immediate explosion and a sheet of flames shot 40 feet out the window onto the street. Defendant ran to a nearby vehicle and started to drive southbound. The officer swung his police vehicle across the street and stopped defendant. Sergeant Warner detected a very strong odor of what appeared to be gasoline inside the car. After turning defendant over to other officers, he detected an odor of gasoline from the building. He also identified an empty 5-gallon can, which was burnt, charred, containing ice, which was given to him by a firefighter during the fire.

Robert Cortesi, a Chicago firefighter, testified he gave the 5-gallon can, which had an odor of gasoline, to Sergeant Warner. He identified photographs of the premises where he had recovered the can. This witness was of the opinion that the fire was unusual in that it looked as if it had originated in several different places in the premises.

/Chicago Police Officer Robert Kane testified that, when he arrived on the scene, Sergeant Warner identified defendant as the man who had set the fire. Defendant explained to this witness that he was fixing his carburetor and lived around the block. However, Officer Kane noticed a strong odor of gasoline in defendant's vehicle and asked defendant to step out of the vehicle. Defendant's jacket was damp and had a strong odor of gas. On the front seat he noticed two flares in a cellophane package, a crowbar and a pair of work gloves. A pair of pliers was found on the front floor of the passenger side of the car. In the back seat on the floor were several empty plastic milk cartons. The gloves were also damp and had a strong odor of gasoline. The gloves and jacket were admitted into evidence.

Chicago Police Officer Anton Franicevich testified he arrived on the scene at 3:45 a.m. and observed flames

jetting out of the large picture window on the first floor of the premises. He helped 3 persons evacuate the upstairs premises.

Chicago Police Officer Kenneth Pardell testified he saw the fire from the corner of North Avenue and noticed an odor of gasoline from the building. He drove defendant's vehicle to the police station and was able to start it with the key.

William W. Tyrrell, a Chicago Police Department chemist, testified he performed tests on pieces of cloth samples taken from the coat and gloves which showed a positive reaction for gasoline.

Robert Schaudenecker, a battalion fire chief, testified that around 3:50 a.m., he responded to the fire and observed a large volume of flames coming out the front window. He explained that it was unusual for a fire to blow out the windows, such as in the present case, because the building did not have enough combustibles inside it to produce this much flame. In his opinion, the intensity of the fire was attributable to the presence of an accelerant, such as gasoline, fuel or oil.

George Schuller testified he is a firefighter with the rank of division marshall. On hundreds of occasions he had observed plastic milk cartons, some intact, some burned, some empty, some filled with flammable fluids. In his experience, a plastic milk carton would be totally consumed in a fire.

Defendant testified he was on his way home when he began having car trouble. When stopped by the officer, he told him his car had broken down. He explained to 2 other officers who arrived that he had been priming his car and that he was stopped because a light was out on his car. Defendant said that he removed the flares and crowbar from the glove compartment when he looked for his pliers. He also claimed that he had 6 milk cartons in

his car when stopped by police because he lived in an unincorporated area where the water system was frozen and he had been picking up water to take to his home. He denied that he threw a flare into the building or had anything to do with the fire.

Defendant contends he was not proved guilty beyond a reasonable doubt. Defendant argues that the items found in his vehicle are items which could have been used in his trade as a carpenter and are insufficient to show guilt. Defendant also points out that a police report shown to Sergeant Warner during his testimony did not contain a narrative statement that he had seen defendant throw a flare through the window to ignite the fire and, consequently, that such testimony at trial by Sergeant Warner was unbelievable. However, Sergeant Warner testified that he did not prepare the police reports to which defendant refers. Moreover, testimony of a single witness is sufficient to convict if it is positive and credible even if it is contradicted by the accused. *People* v. *Berland* (1978), 74 Ill. 2d 286, 307, 385 N.E. 2d 649.

Sergeant Warner was an eyewitness and his testimony was substantially corroborated by the circumstantial evidence provided by the other witnesses. The trial court's determination will not be set aside unless a reasonable doubt of guilt appears. (*People* v. *Catlett* (1971), 48 Ill. 2d 56, 64, 268 N.E. 2d 378.) The evidence is overwhelming and proves defendant's guilt of arson beyond a reasonable doubt.

The State has argued that the defendant's brief should be stricken because it does not comply with the requirements of Supreme Court Rule 341 (Ill. Rev. Stat. 1977, ch. 110A, par. 341), in particular, since the brief does not contain a statement of facts and because cases cited in the Points and Authorities section are not mentioned

in the Argument section. One case cited in the Argument section is omitted entirely from the Points and Authorities section and another case is improperly cited. Counsel's complete omission of the statement of facts is a serious breach of the rules pertaining to briefs, but in view of the disposition of the appeal, we find it unnecessary to strike the defendant's brief. *People* v. *Madden* (1977), 52 Ill. App. 3d 951, 368 N.E. 2d 384.

This case presents no issue of precedential importance and an opinion is unnecessary. We therefore dispose of the matter pursuant to Supreme Court Rule 23 (Ill. Rev. Stat. 1977, ch. 110A, par. 123); the judgment of the circuit court of Cook County is affirmed.

Dated at Chicago, Illinois, this 14th day of December, 1979.

ENTER:

/s/ Kenneth E. Wilson
Kenneth E. Wilson, Justice

/s/ Francis S. Lorenz
Francis S. Lorenz, Justice

/s/ James J. Mejda
James J. Mejda, Justice

78-2015)
Consolidated
78-717)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

DONALDSON KIMBROUGH,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable MARK E. JONES, *Presiding.*

ORDER

Petition for rehearing is denied.

ENTER:

/s/ Kenneth E. Wilson
Kenneth E. Wilson, Justice
/s/ Francis S. Lorenz
Francis S. Lorenz, Justice
/s/ James J. Mejda
James J. Mejda, Justice

DATED: January 9, 1980

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, Illinois 62706
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March 27, 1980

Mr. Richard T. Sikes
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11 S. La Salle St., S 1715
Chicago, IL 60603

No. 53034 - People State of Illinois, respondent, vs. Donaldson Kimbrough, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court